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No. 80-1715

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT J. KUHN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners are entitled to take an immediate appeal from the district court's denial of their motion to dismiss the indictment on double jeopardy grounds after the jury at their first trial was unable to reach a verdict.

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OPINIONS BELOW

The order of the court of appeals dismissing petitioners' appeal (Pet. App. 36-37) is unreported. The prior opinion of the court of appeals is reported at 629 F. 2d 1087. The opinion of the district court (Pet. App. 1-35) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1981. The petition for a writ of certiorari was filed on April 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were indicted and tried in the United States District Court for the Western District of Texas on one count of conspiracy to suborn perjury, in violation of 18 U.S.C. 371 and 1622. When the jury was unable to reach a verdict, the district court declared a mistrial. After the case

was set for retrial, petitioners filed a motion to dismiss the indictment and to bar retrial, claiming that the evidence presented by the government during the first trial was legally insufficient to support a finding of guilt. The district court denied the motion (Pet. App. 1-35). Following an exhaustive review of the evidence, the district court found that, "[v]iewing the evidence in a light most favorable to the Government, it appears that the evidence is sufficient to support a finding of guilt as to each of the Defendants" (Pet. App. 28).

Petitioners then filed an appeal to the court of appeals, again contending that the evidence adduced by the government during the first trial was legally insufficient. The court of appeals "assume[d] without deciding" that jurisdiction to entertain an interlocutory appeal existed (629 F. 2d 1087 (1980)). Turning to the merits of petitioners' claim, the court ruled as follows (*id.* at 1087-1088): "We have surveyed the record * * * and conclude that the judge correctly denied appellants' motion for acquittal insofar as it was based on an insufficiency of inculpatory evidence." The court added (*id.* at 1088) that the evidence was "clearly susceptible to the interpretation" that petitioners engaged in a conspiracy to suborn perjury.

Following this ruling, a different panel of the court of appeals held that there is no appellate jurisdiction under 28 U.S.C. 1291 to review an interlocutory order of a district court rejecting a claim of evidentiary insufficiency following a mistrial. *United States* v. *Becton*, 632 F. 2d 1294 (5th Cir. 1980). On the basis of the *Becton* decision, the court below withdrew its earlier opinion deciding the merits of petitioners' claim and issued an order dismissing the appeal for lack of jurisdiction (Pet. App. 36-37).

ARGUMENT

Petitioners contend (Pet. 7-14) that under *Abney* v. *United States*, 431 U.S. 651 (1977), they were entitled to

immediate appellate review of the district court's pretrial ruling denying their motion to dismiss the indictment. In their submission, *Abney* requires the court of appeals to decide, before any retrial, whether the evidence presented by the government during the first trial was legally sufficient to sustain a conviction. In the absence of such a determination, petitioners claim, they may not be retried consistent with this Court's decision in *Burks* v. *United States*, 437 U.S. 1 (1978). That contention is without merit.

1. In *Abney*, this Court determined that a Double Jeopardy claim was reviewable on an interlocutory basis. The defendants in *Abney* asserted that, because the original indictment against them had been "duplicitous" and the jury had returned a general verdict of guilty, the jury may have acquitted them on one of the charges contained in the duplicitous indictment while convicting them on the other. They contended that the Double Jeopardy Clause barred their retrial following reversal of their conviction on appeal, in light of this possible "acquittal" by the jury. 431 U.S. at 664.

Abney concluded that this Double Jeopardy claim was "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged." 431 U.S. at 659. The Court emphasized that the "defendant makes no challenge whatsoever to the merits of the charge against him" (*ibid.*). It also observed that the "elements of [the Double Jeopardy] claim are completely independent of his guilt or innocence" (*id.* at 660). Since the order challenged on appeal was completely "collateral" to the merits of the controversy, and since it could not effectively be reviewed following final judgment after retrial, the Court granted immediate review.

Abney also held, however, that other claims asserted by the defendant could not be appealed on an interlocutory

basis. In particular, this Court rejected the assertion that a defendant in a criminal case is entitled to interlocutory review of a pretrial order sustaining the indictment (431 U.S. at 663):

> [A]n order denying a motion to dismiss an indictment for failure to state an offense is plainly not "collateral" in any sense of that term; rather it goes to the very heart of the issues to be resolved at the upcoming trial.[1]

The decision of the district court in this case, ruling that the government had presented sufficient evidence to justify a finding of guilt, is a classic example of a pretrial order that "goes to the very heart of the issues" to be resolved at trial. Rather than being "collateral," the challenged order relates directly and exclusively to the merits of the prosecution. As the Fifth Circuit recently explained in *United States* v. *Rey*, 641 F. 2d 222, 225 (1980):

> These * * * claims of insufficient evidence * * * cannot be resolved in this appeal. "Although in form the question presented here is that of denial of a motion asserting double jeopardy, in reality and substance the appellants seek review of their motions to acquit made at the first trial." * * *
>
> Denials of motions to acquit are not interlocutorily appealable because, being nothing more than a motion for directed verdict, they are not collateral to the merits

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[1] *Abney* thus reaffirmed the well established rule that a pretrial order that does not meet the standards of a "collateral order," as prescribed in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is not subject to an immediate appeal. This is true even though reversal of the order on appeal would obviate the need for a trial. See, *e.g.*, *United States* v. *MacDonald*, 435 U.S. 850 (1978); *Heike* v. *United States*, 217 U.S. 423 (1910). Immediate review is not available to test claims that are "enmeshed in the factual and legal issues" to be resolved during the trial on the merits. *Firestone Tire & Rubber Co.* v. *Risjord*, No. 79-1420 (Jan. 13, 1981), slip op. 9.

> but are instead "precisely directed" to them. * * * The second element of the collateral order test is thus not met.

On this basis, the courts of appeals repeatedly have concluded that a "denial of a motion for acquittal is not a final, appealable decision [under *Abney*] even when made after a hung jury mistrial." *United States* v. *Carnes*, 618 F. 2d 68, 70 (9th Cir.), cert. denied, 447 U.S. 929 (1980); accord, *United States* v. *Ellis*, No. 80-5069 (4th Cir. Apr. 8, 1981); *United States* v. *Becton*, 632 F. 2d 1294, 1295-1296 (5th Cir. 1980); *United States* v. *Young*, 544 F. 2d 415, 416 (9th Cir.), cert. denied, 429 U.S. 1024 (1976). In light of these precedents, the court below correctly dismissed petitioners' appeal from the district court's ruling on the sufficiency of the evidence.

2. In any event, whatever the merits of petitioners' claim that immediate appellate review of the sufficiency of the government's evidence is required before a defendant can be retried following a hung jury,[2] this case is an inappropriate vehicle to decide the issue. Both the district court and the court of appeals expressly found that the evidence adduced at petitioners' first trial was sufficient to support a conviction (see 629 F. 2d 1087-1088). Although the court of appeals later withdrew its original decision on jurisdictional grounds, it reaffirmed that "[i]n our original opinion, we decided the merits of this attempted *Abney*-type appeal * * *" (Pet. App. 37). Accordingly, even if petitioners were to persuade this Court that the court of appeals had jurisdiction to review their claims, they would be entitled to no

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[2]In cases in which defendants successfully have appealed an initial conviction, and have claimed on remand that retrial is barred by the government's failure to adduce sufficient evidence during the original trial, two courts of appeals have granted immediate appellate review. See *United States* v. *United States Gypsum Co.*, 600 F. 2d 414 (3d Cir. 1979); *United States* v. *Jelsma*, 630 F. 2d 778 (10th Cir. 1980).

relief. In these circumstances, a ruling on the jurisdictional issue raised by petitioners would be equivalent to an advisory opinion that could confer no practical benefit on them, but would serve only to further delay the retrial of the charge against them.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]The first trial ended in a mistrial in September 1979. The district court decided petitioners' dismissal motion in January 1980.

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